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### Constitutional Law—The Right to Counsel for Drunk Drivers: *Pickard v. Director of Motor Vehicles*, 184 Neb. 13, 165 N.W.2d 96, motion for rehearing overruled, 184 Neb. 573, 169 N.W.2d 460 (1969)

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CONSTITUTIONAL LAW—THE RIGHT TO COUNSEL FOR DRUNK DRIVERS. *Pickard v. Director of Motor Vehicles*, 184 Neb. 13, 165 N.W.2d 96, *motion for rehearing overruled*, 184 Neb. 573, 169 N.W.2d 460 (1969).

## I. INTRODUCTION

Since the landmark decisions of *Miranda v. Arizona*<sup>1</sup> and *Escobedo v. Illinois*,<sup>2</sup> state and federal courts have struggled to set the boundaries on further interpretation of one's constitutional rights in areas other than the criminal law. For example, those states which have enacted implied consent laws have been consistently confronted with the assertion of these constitutional arguments by those convicted of driving while under the influence of intoxicating liquor. By and large the courts sitting in implied consent states have remained impervious to the general trend generated by *Miranda* and *Escobedo* by narrowly construing the rights of those individuals accused of driving while under the influence.

Recently, several states have for the first time dealt with the issue of whether an accused suspected of driving under the influence should be afforded consultation with or have access to counsel as a condition precedent to taking a blood, breath or urine test. The vast majority of states have refused to allow the right to counsel in these cases.

Since *Finocchiaro v. Kelly*<sup>3</sup> was decided in 1962, most courts interpreting implied consent laws have held that one accused of driving while under the influence cannot successfully complain that his constitutional rights were infringed because he was denied access to counsel. Four years later, the United States Supreme Court in *Schmerber v. California*<sup>4</sup> affirmed the criminal conviction of an individual subject to the California implied consent law. The *Schmerber* case rejected the appellant's arguments based on the fourth, fifth and sixth amendments.

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<sup>1</sup> 384 U.S. 436 (1966).

<sup>2</sup> 378 U.S. 478 (1964).

<sup>3</sup> 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403, *cert. denied*, 370 U.S. 912 (1962).

<sup>4</sup> 384 U.S. 757 (1966).

At least two state jurisdictions, Nebraska<sup>5</sup> and New York,<sup>6</sup> have departed from the general principles set forth in *Schmerber* and *Finocchiaro* by allowing counsel, in certain circumstances, to one accused of driving while under the influence. The Nebraska Supreme Court has limited the right to counsel only where the appropriate factual context was present at the time of arrest. The New York Court of Appeals has held that one accused of driving while under the influence should be permitted access to counsel under particular circumstances.

The government in general and the courts in particular have become increasingly aware of the large number of deaths and injuries both to property and persons caused by the drinking driver. Recent studies conducted on both the state and federal level have revealed that a disproportionately small number of drinking drivers are involved in over half the fatal accidents.<sup>7</sup> These factors have been influential in restricting the expansion of constitutional rights to drinking drivers in order to minimize the peculiar threat to public safety. Consequently, the power of law enforcement agencies has remained relatively unencumbered by constitutional restrictions when enforcing the implied consent law.

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<sup>5</sup> *Pickard v. Director of Motor Vehicles*, 184 Neb. 13, 165 N.W.2d 96, motion for rehearing overruled, 184 Neb. 573, 169 N.W.2d 460 (1969).

<sup>6</sup> *People v. Gursey*, 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968).

<sup>7</sup> An interview on August 14, 1969 with Tom Ryan, Chief of Accident Records for the state of Nebraska produced the following facts: There were approximately 900,000 licensed motor vehicles and operators in Nebraska during 1968. In that year there were over 40,000 automobile accidents with 452 deaths and 18,478 personal injuries. Significantly, out of the 452 recorded highway fatalities in 1968, 90 were reported to have involved drinking drivers. For additional information concerning the drunk driver see, *The Christian Science Monitor*, Nov. 29, 1969, at 5, col. 1. The *Monitor* article reported the results from a recent study compiled by the Indiana State Police Department which looked into the causes of fatal traffic accidents. The Indiana study, "Analogue 1000," produced similar findings to those reported in other states. It was based on 1,238 fatalities in 1,000 fatal traffic accidents occurring between 1965 and 1967. The following conclusions were formulated from "Analogue 1000:"

- 1) More than fifty percent of those killed in a traffic accident had been in a collision involving a drunk driver.
- 2) Fifty percent of the drunk drivers had blood-alcohol levels exceeding the legal minimum.
- 3) The 30 to 45 age group was the most susceptible to a fatal accident after drinking.
- 4) That very few of the drunk drivers had previous incidents of arrest or accidents before their fatal collision.

The practical effect of the implied consent law is to compel the accused either to submit to one of several chemical tests or face possible revocation of his driver's license. The accused must determine his course of action in a short span of time. It is at this point that decision making by the accused drunk driver becomes critical in relationship to future sanctions imposed by the implied consent law. If the accused refuses to submit to a chemical test he becomes subject to both civil and criminal sanctions. However, if the accused consents to a chemical test the possibility of civil sanction is immediately terminated.

Initially, this comment will attempt to determine the effect of *Pickard v. Director of Motor Vehicles*<sup>8</sup> on the general course charted by prior Nebraska cases. Secondly, the language contained in the *Pickard* dictum will be examined and compared to decisions from other states operating under an implied consent law. The following topics will be used for the comparison: (1) The operation of an appropriate factual context; (2) The operation of the civil and criminal proceedings; (3) The operation of the critical stage argument; and (4) The operation of the *Miranda* warnings.

*Pickard* involved an appeal challenging the validity of a revocation order issued by the Director of Motor Vehicles suspending the appellant's drivers license for a period of one year. The facts indicated the appellant had been arrested in March, 1966, for driving while under the influence of intoxicating liquor. According to testimony given by the arresting officer, *Pickard* was placed under arrest at approximately 4:30 P.M. At the station house the arresting officer read the implied consent rules to the appellant and then requested the appellant to submit to a chemical test. The officer testified that the accused refused to submit to the test. Subsequently, the officer began to interrogate the appellant at which time, according to the officer's version, the appellant requested a lawyer. The officer then permitted *Pickard* access to a telephone, but he was unable to contact his lawyer.

The testimony given by appellant and his passenger, Lally, conflicted with that given by the officer on several important facts. First, appellant testified that the arrest was made at 5:00 P.M. rather than 4:30. Appellant did not refuse to submit to a chemical test but only asked to talk with a lawyer. Later, when a lawyer was contacted and arrived at the station, the appellant was not again asked to submit to a chemical test.

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<sup>8</sup> 184 Neb. 13, 165 N.W.2d 96, *motion for rehearing overruled*, 184 Neb. 573, 169 N.W.2d 460 (1969).

Justice McCown, writing for the majority, affirmed the revocation order. However, the opinion did not stop at affirming the revocation order but went on to establish a test providing the right to counsel in certain circumstances.

In an appropriate factual context, a request for a brief delay in making the decision to accept or refuse the chemical test in order to consult with a lawyer should be granted where the delay is short and does not jeopardize the effectiveness of the test. . . . The taking of a chemical test authorized by the Implied Consent Law is not *ordinarily* required to be delayed by a request of the arrested motorist that he be permitted to contact legal counsel.<sup>9</sup>

Chief Justice White in a dissenting opinion, attacked the rule set forth by the majority, stating: "[We] are faced with a situation that will result in emasculation of the enforcement of the statute [Implied Consent Law]."<sup>10</sup> Furthermore, the Chief Justice forecast that its operation would "effectively prevent the disciplining and control of the borderline drinking driver"<sup>11</sup> because the burden has been unnecessarily placed upon the state and the arresting officer.

In a separate dissent, Justice Carter articulated the fear that such a test would place an undue burden on the arresting officer and that the test "induces confusion as to the law in a case where the law is clear."<sup>12</sup>

*Pickard* has departed from the traditional policy enunciated by the court in *Prucha v. Department of Motor Vehicles*,<sup>13</sup> which held: "The language of the statute is clear and there is nothing on its face that requires the police officer to go any further than

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<sup>9</sup> *Id.* at 574, 169 N.W.2d at 460.

<sup>10</sup> *Id.* at 579, 169 N.W.2d at 463.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 580, 169 N.W.2d at 463.

<sup>13</sup> 172 Neb. 415, 110 N.W.2d 75 (1961). See *State v. Dubany*, 184 Neb. 337, 341-42, 167 N.W.2d 556, 559 (1969), where the defendant was convicted of unlawfully operating a motor vehicle while under the influence of alcoholic liquor, and appealed. Evidence indicated the defendant was not advised of his constitutional rights prior to questioning at the scene of arrest by the arresting officer. During this questioning the accused admitted drinking. His admission was introduced into evidence at the trial. However, the court dismissed the defendant's contention that his rights had been violated by stating: "The only statement of defendant mentioned by the patrolman in his testimony was defendant's answer of 'Yes' to the inquiry as to whether he had been drinking. This inquiry was made when defendant was still in his own truck, not in custody, and while he was under no coercion. In on-the-scene investigations the police may interview any person not in custody and not subject to coercion for the purpose of determining whether a crime has been committed and who committed it."

request the motorist to submit to the test."<sup>14</sup> Obviously, when the mandate in *Pickard* is used, the arresting officer must make more than a mere request when one accused of driving while under the influence asks for a lawyer. The court in *Prucha* resolved a different constitutional issue, to wit: whether the taking of blood under the implied consent law violated the fifth amendment privilege against self-incrimination. In response to the fifth amendment argument the court stated: "A license is a privilege and does not create property in any legal or constitutional sense. By the act of driving his car, he has waived his constitutional privilege of self-incrimination, which has always been considered to be a privilege of a solely personal nature which may be waived."<sup>15</sup>

*Pickard* and *Prucha* take inconsistent approaches in making constitutional rights available to those who are accused of driving while under the influence of alcohol. Ironically, the court permits the sixth amendment arguments in the appropriate factual context, but totally denies the application of the fifth amendment in all circumstances.

Traditionally, the fundamental rights guaranteed by the fourth, fifth and sixth amendments have been applied with an equal hand to redress injustices. However, *Pickard* and *Prucha* have resulted in an unequal application of this traditional principle by allowing the right to counsel in certain limited circumstances while at the same time effectively eliminating the defense of self-incrimination in all cases. This artificial distinction is at odds with the basic concepts behind Anglo-American justice.

The policy enunciated in *Prucha* was followed by the court in *Ziemba v. Johns*.<sup>16</sup> In *Ziemba*, the court decided that a plea of guilty to a criminal charge of drunk driving does not satisfy the reasonableness test by one who refused to submit to a chemical test. The court rejected the argument that a plea of guilty to the criminal charge of driving under the influence ought to obviate the civil proceedings, the rationale behind this rejection being: "Each action proceeds independently of the other and the outcome of one action is of no consequence to the other."<sup>17</sup>

On rehearing the court in *Pickard* did not give much attention to the equal protection argument which was raised in *Ziemba*.

<sup>14</sup> 172 Neb. at 420, 110 N.W.2d at 80.

<sup>15</sup> *Id.* at 423-24, 110 N.W.2d at 82.

<sup>16</sup> 183 Neb. 644, 163 N.W.2d 780 (1968).

<sup>17</sup> *Id.* at 646, 163 N.W.2d at 781. For a discussion of the decision in *Ziemba*, see *Nebraska Supreme Court Review*, 48 NEB. L. REV. 985, 1039 (1969).

Perhaps one reason is the inability of the court to reconcile the language of *Ziemba* with the rule allowing the right to counsel in certain cases. It is important to recognize that *Ziemba* focused on the legitimacy or validity of independently conducted proceedings to produce results that would bind each other. However, the *Pickard* decision focused on the choice made by the accused at the time of arrest. His choice would determine the number of proceedings to which he would be subject.

In *State v. Amick*<sup>18</sup> the court held that one accused of drunk driving does not have the right to a jury trial. *Amick*, in rejecting this right, stated "that the offense charged in the instant case [drunk driving] is outside of the purview of the cited provision of the Constitution [Nebraska Constitution article one, section six, which provides the right of trial by jury]."<sup>19</sup>

These early Nebraska decisions of *Prucha*, *Ziemba*, and *Amick* clearly exemplified a restrictive interpretation of the constitutional rights guaranteed to one accused of driving while under the influence of alcohol. Furthermore, these cases construed together, demonstrate a definite policy decision to subordinate the constitutional rights of the accused to the public welfare. Clearly, *Pickard* does not follow the restrictive approach of earlier cases but until the courts provide additional clarification, it will be impossible to determine the extent and nature of the change contemplated by the court.

Before turning to those states which have reached results opposite from *Pickard*, it should be noted that Nebraska was not the first jurisdiction to permit counsel to one accused of driving under the influence. In *People v. Gursey*,<sup>20</sup> the New York Court of Appeals followed the concurring opinion in *Finocchiaro* to permit the extension of counsel to those accused of driving under the influence. In *Gursey* the accused was told after his arrest that he could call an attorney after he gave certain information. After cooperating with the arresting officer, the accused renewed his request for counsel, but it was refused. When the appellant refused to submit to a drunkometer test, another officer told the accused that failure to submit would mean losing his drivers license. It was only after this threat that the accused reluctantly consented to submit. The evidence from the test was later admitted at the trial and ultimately convicted him of the criminal charge of drunken driving. The supreme court reversed the criminal conviction and the court of appeals in affirming that decision held:

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<sup>18</sup> 173 Neb. 770, 114 N.W.2d 893 (1962).

<sup>19</sup> *Id.* at 772, 114 N.W.2d at 894.

<sup>20</sup> 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968).

Granting defendant's requests would not have substantially interfered with the investigative procedure, since the telephone call would have been concluded in a matter of minutes. . . . Consequently, the denial of defendant's requests for an opportunity to telephone his lawyer must be deemed to have violated his privilege of access to counsel.<sup>21</sup>

However, the holding in *Gursey* is distinguishable from the *Pickard* dictum in several significant respects. First, the New York court established a definite precedent in *Gursey*, but the dictum in *Pickard* does not necessarily bind future decisions. Also, there are no limiting factors such as "appropriate factual context" or a requirement of a felonious crime on the application of the New York rule; rather, the case applies the right to counsel equally. In addition, *Gursey* provides a definitive rule, thereby eliminating the confusion involved in the *Pickard* test. *Gursey* stated that one accused of driving while under the influence should be afforded access to counsel, but "[i]f the lawyer is not physically present and cannot be reached promptly by telephone or otherwise, the defendant may be required to elect between taking the test and submitting to revocation of his license, without the aid of counsel."<sup>22</sup>

In operation the New York approach will allow counsel in all cases if the accused can promptly contact his lawyer. Therefore, the only burden placed on the arresting officer is the determination of whether there is undelayed access to a telephone or whether the lawyer is present. The decision in *Gursey* placed the emphasis upon the accused's right of access to an attorney rather than the right to consult with an attorney as evident in *Pickard*.

## II. THE DETERMINATION OF THE APPROPRIATE FACTUAL CONTEXT

The portion of the *Pickard* rule that causes the most confusion is the court's meaning of "appropriate factual context." Its determination is dependent on two related issues: first, whether complying with the accused's request means only a brief delay and second, whether the accused has been involved in a felonious offense.

The basic criticism surrounding the appropriate factual context test is the obvious omission of concrete guidelines. The rule does not establish an easily understandable method for law enforcement officials to determine whether to comply with a request from one accused of driving under the influence to contact a lawyer. There-

<sup>21</sup> *Id.* at 228, 239 N.E.2d at 353, 292 N.Y.S.2d at 419.

<sup>22</sup> *Id.* at 229, 239 N.E.2d at 353, 292 N.Y.S.2d at 419. *But see* *People v. Sweeney*, 55 Misc. 2d 793, 286 N.Y.S.2d 506 (1968) and *People v. Gielarowski*, 58 Misc. 2d 832, 296 N.Y.S.2d 878 (1968).



fore, the arresting officer is left with his own subjective assessment which in turn will breed uncertainty in the enforcement of the rule. In addition, serious consideration should be directed to the interpretation the accused will place on the phrase. The vagueness of the phrase lends itself to potential misunderstanding as to its application in a particular case. Furthermore, the accused may have been furnished with an offensive weapon, not only to hinder and confuse the arresting officer, but to consume valuable time that could affect the efficacy of a subsequent blood test.

The *Pickard* court conditioned the phrase "appropriate factual context" by inserting the requirement that any delay in administering be brief. While the *Pickard* court gave recognition to the language used in *Schmerber*, that alcohol dissipates from the blood stream at a rapid rate once the liquor intake has stopped, it did not state the time limits in objective terms. Therefore, the determination of "brief delay" has been left to case by case adjudication.

The Supreme Court of South Dakota, in *Blow v. Commissioner of Motor Vehicles*,<sup>23</sup> recognized the adverse impact of permitting delays in blood tests upon the enforcement of the drunk driving laws, and held that one accused of driving while under the influence had no constitutional right to counsel when requested to submit to a blood test. In addition, California cases have acknowledged delays of one hour<sup>24</sup> as well as forty and thirty-five minutes<sup>25</sup> to be grounds for subsequent suspension when the delay was caused by a request for counsel.

In *Pickard*, the actual length of delay was disputed. The delay at most was less than one hour from the time the appellant made his request until a lawyer arrived at the police station. Nevertheless, *Pickard's* license was revoked and that revocation was affirmed, presumably because there was not an appropriate factual context at the time of arrest for making the request. Therefore, it is uncertain whether a similar delay of one hour or less would be a brief delay when an appropriate factual context arose.

Theoretically, the arresting officer could circumvent the rule by later testifying that compliance with the accused's request would have caused an extended delay. For example, law enforcement officers located in the western part of the state could typically be faced with an extended delay if required to supply the accused a lawyer. In many cases the distance between towns may be miles

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<sup>23</sup> 83 S.D. 628, 164 N.W.2d 351 (1969).

<sup>24</sup> *Ent v. Department of Motor Vehicles*, 265 Cal. App. 2d 936, 71 Cal. Rptr. 726 (1968).

<sup>25</sup> *Zidell v. Bright*, 264 Cal. App. 2d 867, 71 Cal. Rptr. 111 (1968).

from the scene of arrest and the attempt to return to town would consume valuable time. Presumably, the delay of returning to town before the test is given may be unnecessary if a breathometer test can be administered at the location of the arrest.

The arresting officer, in addition to ascertaining whether to allow the accused to consult with a lawyer, which will cause a substantial delay, must determine if a felony has been committed. *Pickard*, on rehearing, elaborated the circumstances when one accused of driving under the influence should be allowed counsel. The court concluded that counsel should be available only if a felony offense has been committed in connection with driving under the influence. Justice McCown, on rehearing, cited the possibility of the accused being involved in a fatal accident and as a result being subject to the charge of motor vehicle homicide. Also, the accused may be subject to the statutory felony charge arising out of a third offense drunk driving charge.

*Schmerber* was distinguished on the basis that the accused was appealing a conviction of a misdemeanor and therefore, even under later cases was not entitled to a lawyer. *Pickard* dismissed the apparent incongruity with *Schmerber* by commenting that: "The distinctions between that case and a 'serious criminal case' in Nebraska are obvious. . . ."<sup>26</sup>

Recently, several California decisions have reached different results concerning the problem of right to counsel for the accused drunk driver who is also suspected of a related felony. In *People v. Fite*<sup>27</sup> the defendant was found guilty of felony drunk driving. The facts showed that after the accident the defendant and several other individuals suffered personal injury. At this point the defendant was requested to take a blood alcohol test, but he refused. Subsequent to his refusal, the blood alcohol test was administered without the defendant's consent. At the trial these test results, showing .21 alcoholic content, were admitted into evidence over the objection of the defendant. The court did not distinguish between a felony as compared to the misdemeanor drunk driving case, thereby denying the accused the right to counsel in each case. Instead, the opinion construed the California implied consent law in the following language:

[A] suspected drunk driver has no right to resist or refuse a test and, if the requirements established by *Schmerber* are met, the results of a blood test taken without a person's consent constitute admissible evidence in a prosecution . . .<sup>28</sup>

<sup>26</sup> 184 Neb. 573, 576, 169 N.W.2d 461 (1969).

<sup>27</sup> 267 Cal. App. 2d 685, 73 Cal. Rptr. 666 (1968).

<sup>28</sup> *Id.* at 690, 73 Cal. Rptr. at 670.

In another California case, *People v. Wren*,<sup>29</sup> the court of appeals reaffirmed the earlier decision of *Fite*. In *Wren* the court rejected the defendant's contention that "nonconsensual withdrawal of a blood sample deprived him of certain statutory rights and also of his constitutional rights."<sup>30</sup>

Obviously, the *Schmerber* court did not conclusively settle the issue of right to counsel for those accused of driving under the influence. *Pickard* concluded that *Schmerber's* holding was limited to misdemeanor cases while *Fite* and *Wren* have expanded the dictates of *Schmerber* to both felony and misdemeanor cases in California. In addition, under the *Gursey* case even those accused of the misdemeanor of drunk driving are afforded access to counsel. The defect present in the Nebraska opinion is that it attempts to distinguish between the misdemeanor and felony offense prior to the time when charges will be brought against the accused. The determination of whether one accused of driving under the influence has sustained two prior convictions is not apparent at the time of arrest. Therefore, in the majority of cases it will not be obvious to the arresting officer that the man he is arresting for driving under the influence will be subject to a felony.

### III. CRIMINAL AND CIVIL SANCTIONS

In *Ziemba v. Johns*,<sup>31</sup> the Nebraska Supreme Court emphasized that the civil and criminal proceedings operated separately and independently of one another. Therefore, the conviction or acquittal of the criminal charge of drunk driving does not stop the Director of Motor Vehicles from initiating a revocation proceeding. *Pickard* should have no adverse effect on the decision of the Director of Motor Vehicles to institute proceedings to revoke the operating privileges of a driver who unreasonably refuses to submit to a chemical test. Because the criminal proceedings for drunk driving operate separately and apart from any civil proceedings, the accused cannot successfully contend that by reason of denial of counsel he should have a defense in both proceedings. Since the sixth amendment right to counsel is applicable only in criminal cases, the accused does not receive any carry-over effect in a civil proceeding. As a consequence, one accused of driving while under the influence may be able to demonstrate an appropriate factual context. However, those facts could prove irrelevant in determining an unreasonable refusal in a civil action.

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<sup>29</sup> 271 A.C.A. 897, 76 Cal. Rptr. 673 (1969).

<sup>30</sup> *Id.* at --, 76 Cal. Rptr. at 675.

<sup>31</sup> 183 Neb. 644, 163 N.W.2d 780 (1968).

The California cases have also faced the problem of rationalizing the operation of two systems, civil and criminal; however, in doing so they have reached a different conclusion than *Pickard*. The appellant in *Finley v. Orr*<sup>32</sup> was informed of his right to remain silent and of his right to counsel incident to his arrest for driving while under the influence. After the arresting officer informed the accused of those rights, the accused immediately requested the presence of counsel. The police denied the accused's request and asked him to submit to a blood test. However, the accused refused the request. Later the appellant lost his drivers license through revocation by the Director of Motor Vehicles. The *Finley* court rejected appellant's contention that was patterned on the holdings in *Escobedo* and *Miranda* and held:

[S]uspects have no constitutional right to refuse a breathalyzer test 'whether or not counsel is present' . . . . In civil proceedings concerning the suspension of a person's driving privilege, it has been held [in other states] that such person does not have a right to counsel when he is requested to submit to a required test.<sup>33</sup>

Two other California cases indicate a rejection of the contention that right to counsel has been violated when the accused is appealing from a civil revocation. Clearly, under California law, a demand, by one accused of driving under the influence, for counsel as a condition precedent to taking a blood test will not preclude a later civil proceeding instigated by the Director of Motor Vehicles to suspend the accused's drivers license. In *Zidell v. Bright*,<sup>34</sup> a court of appeals affirmed the revocation order issued by the Director of Motor Vehicles. In *Zidell* the appellant contended the thirty to forty-five minute delay between his telephone conversation with his lawyer and his ultimate consent to submit was not an unreasonable refusal. However, during the time used by the accused, the arresting officer had returned to his duty. Later when the officer was notified that the accused had changed his mind and would submit to the blood test, the arresting officer refused to return to the station house.

After considering the actions of the appellant and the arresting officer the court held:

It would be inconsistent with the purpose of the statute to hold that either Officer Ruddick [the arresting officer], or the officers on duty at the police station, were required to turn aside from their other responsibilities and arrange for administration of a belated test when once appellant had refused to submit after fair warning of the consequences.<sup>35</sup>

<sup>32</sup> 262 Cal. App. 2d 656, 69 Cal. Rptr. 137 (1968).

<sup>33</sup> *Id.* at 664, 69 Cal. Rptr. at 141-42 (citations omitted).

<sup>34</sup> 264 Cal. App. 2d 867, 71 Cal. Rptr. 111 (1968).

<sup>35</sup> *Id.* at 870, 71 Cal. Rptr. at 113 (1968).

In *Westmoreland v. Chapman*,<sup>36</sup> the accused was observed by the arresting officer to be "weaving, and crossed the center"<sup>37</sup> and, when stopped, exhibited red eyes, slurred speech, and inability to stand on his own. After he was advised of his constitutional right to counsel and right to remain silent, the accused was requested to submit to a blood test. At that point, the accused requested the advice of a lawyer. The *Westmoreland* court discussed the implications raised by the appellant's right to counsel contention in regard to the later civil proceedings brought against him. The court held:

It is now settled that in a civil proceeding for suspension of a person's driving privilege under the California Implied Consent Law, a driver does not enjoy the right to consult with counsel, or to have counsel present, before deciding to submit to the chemical tests prescribed by the statute inasmuch as such tests do not violate one's right against self-incrimination.<sup>38</sup>

The Iowa Supreme Court in *Gottschalk v. Sueppel*,<sup>39</sup> decided a case involving similar allegations as were adjudicated in Nebraska, California, South Dakota, and Virginia. In *Gottschalk* the appellant alleged his constitutional right to counsel under the sixth amendment had been infringed because he was denied the right to counsel before deciding whether to submit to a blood test. The court specifically placed a limitation on their holding by stating: "[W]e are not concerned with what evidence would be admissible if plaintiff were on trial for [drunken driving]."<sup>40</sup> In respect to those appeals from civil proceedings the court held:

There is no merit to plaintiff's contention he was deprived of due process of law by not having an opportunity to confer with his attorney before electing to consent to a chemical test or to refuse. . . . No authority is cited which supports the view plaintiff was denied due process of law by not having opportunity to confer with his attorney before the attorney came to the jail to see his client.<sup>41</sup>

In a later case the Iowa Supreme Court rejected the contention, *sub silentio*, that counsel should be afforded in an appeal from a criminal conviction for drunk driving. In *State v. Holt*,<sup>42</sup> the accused had been convicted in a criminal action for drunk driving. The main question on appeal was whether there had been a violation of the fifth amendment right against self-incrimination. The court's hold-

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<sup>36</sup> 268 Cal. App. 2d 1, 74 Cal. Rptr. 363 (1968).

<sup>37</sup> *Id.* at 3, 74 Cal. Rptr. at 364.

<sup>38</sup> *Id.* at 4, 74 Cal. Rptr. at 365 (citations omitted).

<sup>39</sup> 258 Iowa 1173, 140 N.W.2d 866 (1966).

<sup>40</sup> *Id.* at 1180, 140 N.W.2d at 870.

<sup>41</sup> *Id.* at 1180-82, 140 N.W.2d at 870-71.

<sup>42</sup> --- Iowa ---, 156 N.W.2d 884 (1968).

ing in *Holt* is sufficiently broad to cover future allegations involving violation of sixth or fourth amendment rights. The Iowa Supreme Court held:

There is no absolute right to drive on the highway under any and all conditions. It is a privilege, not a right. . . . No one has to accept the conditions imposed and thus make himself subject thereto. No one is required to have a driver's license except as a precedent to driving. . . . We know of no reason why a person . . . may not waive such 'rights' as he might otherwise have.<sup>43</sup>

In the most recent reported decision involving the operation of the civil and criminal proceedings, the Supreme Court of Appeals of Virginia, in *Deaner v. Commonwealth*,<sup>44</sup> followed the California decisions. In *Deaner* the defendant was arrested at approximately 1:30 A.M. and was charged with driving while under the influence. The arresting officer advised the accused that under the implied consent law he had impliedly consented to submit to a blood test and refusal to comply would be grounds for revocation of his drivers license. The evidence indicated the accused did not refuse to submit to the blood test; instead he only wanted to consult a lawyer before deciding. However, because of delays at the magistrate's office the accused was not able to contact his lawyer before the two hour period in which the test had to be given according to the statute. The court in rejecting the allegation that no unreasonable refusal was made relied on the earlier precedents set forth in *Blow*, *Finocchiaro*, *Gottschalk* and *Finley*. The rationale for following these earlier cases was stated in the following passage:

The practical effect of this would be that a decision to refuse the test would not be based upon 'reasonableness,' as contemplated by the Implied Consent Law, but whether, in the judgment of the attorney, the refusing of the test would best serve the interest of his client in a trial of the criminal charge of drunk driving.<sup>45</sup>

Furthermore, the court seemingly settled the issue of how the chemical test of either blood, urine or breath correlated with the scheme of both criminal and civil proceedings. *Deaner* held "that the blood test prescribed is a part of a civil and administrative proceeding and that *Deaner* had no right to condition his taking the test upon his ability first to consult with counsel."<sup>46</sup>

In summary, the *Pickard* court left unanswered the effect of their ruling on subsequent civil proceedings in their attempt to formulate a guideline involving criminal sanctions. In contrast the

<sup>43</sup> *Id.* at ---, 156 N.W.2d at 887.

<sup>44</sup> --- Va. ---, 170 S.E.2d 199 (1969).

<sup>45</sup> *Id.* at ---, 170 S.E.2d at 204.

<sup>46</sup> *Id.* at ---, 170 S.E.2d at 204.

majority of jurisdictions have avoided the omission in *Pickard* by adopting one of two theories. One approach is the waiver rationale which employs the fiction that driving under an implied consent law impliedly waives otherwise enforceable constitutional rights. Another approach developed by the Virginia court in *Deaner* disallows the right to counsel based on the rationale that the blood test is part of the civil rather than the criminal proceeding.

#### IV. THE CRITICAL STAGE ARGUMENT

The use and application of the critical stage argument to reach the rule established in *Pickard* deserves special comment. In essence the entire philosophy behind the *Pickard* decision is contingent upon the conclusion that when one accused of driving under the influence is asked to submit to a chemical test this becomes a critical stage in the proceedings. However, at least one jurisdiction has reached a contrary result. In *Ent v. Department of Motor Vehicles*,<sup>47</sup> a California court of appeals held the stage of decision making by the accused was not a critical stage in the proceedings. *Ent* overruled the superior court decision to set aside the suspension of the respondent's drivers license. The facts indicated that the respondent, a practicing attorney, was arrested for driving under the influence. When the arresting officer requested that she submit to a chemical test, she replied that she refused to take any test without her attorney present. The superior court held the respondent's reply to the officer's request was not a refusal, but merely a delay until counsel could arrive. However, the court of appeals disagreed and quoted the following passage from *Finley*:

In civil proceedings concerning the suspension of a person's driving privilege, it has been held, in other states which have implied consent laws . . . that such person does not have a right to counsel when he is requested to submit to a required test.<sup>48</sup>

While *Finley* dealt with appellant's contention concerning the right to counsel in deciding whether to take the test, it did not deal with the right to counsel with respect to choosing which test to take. The court in *Ent* was not persuaded to adopt the distinction between deciding to take the test and deciding which test to take as was urged by the respondent. *Schmerber* was indirectly quoted in support of this statement:

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<sup>47</sup> 265 Cal. App. 2d 936, 71 Cal. Rptr. 726 (1968).

<sup>48</sup> *Id.* at 939, 71 Cal. Rptr. at 729.

Neither the denial of the opportunity for advice of counsel before stating whether one will submit to a test and before *deciding which test to take*, nor the denial of the opportunity to have counsel present while the test is administered, is the denial of any constitutional right.<sup>49</sup>

The decision in *United States v. Wade*<sup>50</sup> attempted to resolve the issue of the critical stage when blood tests were involved. The *Wade* court held:

[S]ystematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like [concern] differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.<sup>51</sup>

*Pickard's* basic premise, that a critical stage is involved, cannot be reconciled with the United States Supreme Court's decision in *Wade*. Therefore, *Pickard* rejects by implication the idea present in *Wade* that a defendant has an opportunity throughout the "ordinary processes of cross-examination" to determine the accuracy of the test and veracity and credibility of expert witnesses.

#### V. THE CONFUSION CAUSED BY *MIRANDA* WARNINGS

In *Pickard* the arresting officer read to the accused a prepared statement explaining the application of the implied consent law. In addition, the officer read to the accused: "You are hereby advised that you have the right to an attorney and if you desire you may call one now."<sup>52</sup> While the effect of this statement did not become significant in *Pickard*, similar statements have presented problems in other jurisdictions.

This type of perfunctory recital of *Miranda* warnings, without further explanation, may mislead one accused of driving while under the influence to believe that he has the immediate right to counsel. Therefore, it is recommended that the arresting officer has

<sup>49</sup> *Id.*

<sup>50</sup> 388 U.S. 218 (1967).

<sup>51</sup> *Id.* at 227-28.

<sup>52</sup> 184 Neb. 573, 575, 169 N.W.2d 460, 461 (1969).



the duty, as a manner of course, to advise the accused that his right to counsel does not apply to choosing whether to submit to a blood test.

When the arresting officer advises an accused of certain constitutional rights and then refuses to allow the accused to exercise those rights, this can only have a bewildering effect. In *Reirdon v. Director of Department of Motor Vehicles*,<sup>53</sup> the accused was arrested for driving while under the influence. Enroute to jail the arresting officer informed the accused that he would have to submit to a chemical test. After arriving at the police station Rierdon was permitted to telephone his lawyer. Subsequent to his telephone conversation the accused refused to take a blood test until his lawyer was present. The appellant's conditional refusal resulted in revocation of his drivers license by the Director of Motor Vehicles. Before the court of appeals the appellant contended, *inter alia*, that "he did not effectively refuse the administration of a chemical test inasmuch as he was *confused* by the *Miranda* advice given by the arresting officers."<sup>54</sup> However, the court did not accept the appellant's allegation of misorientation and confusion, and held:

[T]he record indicates the arresting officer fully explained to petitioner that he only had the right to counsel in connection with the *criminal charge* of driving a motor vehicle under the influence of intoxicating liquor. . . . Consequently, petitioner was not justified in refusing to take the test until an attorney was present inasmuch as he was clearly and unequivocally told that he had no right to the presence of counsel at the time the test was being administered.<sup>55</sup>

In later cases the court determined the *Miranda* warnings were not clearly and unequivocally explained to one accused of driving while under the influence. In *Wethern v. Orr*<sup>56</sup> the accused was arrested for driving under the influence and was informed that he had a right to counsel. In response to the *Miranda* warnings the accused requested the assistance of counsel. Later at the police station the arresting officer read to the accused a statement involving the implied consent law which was followed by a request that the accused submit to a chemical test. In response the accused renewed his original request for presence of counsel. Subsequently, the Director of Motor Vehicles revoked the appellant's drivers license for refusal to submit to the chemical test. It was relevant to the court that at no time was the accused informed that his constitutional rights did not apply to the taking or choosing of a chemical

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<sup>53</sup> 266 Cal. App. 2d 808, 72 Cal. Rptr. 614 (1968).

<sup>54</sup> *Id.* at 810, 72 Cal. Rptr. at 615 (emphasis added).

<sup>55</sup> *Id.* at 811, 72 Cal. Rptr. at 616 (emphasis added).

<sup>56</sup> 271 A.C.A. 925, 76 Cal. Rptr. 807 (1969).

test. The court made it clear that earlier decisions which denied the right to counsel in these circumstances were not being relaxed. However, recognition was given to the possible confusion concerning the *Miranda* warnings. To prevent a recurrence of the situation present in *Wethern* the court held that in the future:

The arrested person should be told the constitutional rights previously explained to him are not applicable to the decision he must make concerning the three chemical tests, and he has no right to consult an attorney before making the decision that he will, or will not, submit to one of them. . . . To the extent that explanation failed to point out the inapplicability of those rights to the decision to, or not to, submit to a chemical test . . . it was erroneous and misleading.<sup>57</sup>

In *Kingston v. Department of Motor Vehicles*,<sup>58</sup> a California court of appeals was again faced with a case involving alleged confusion brought about by a perfunctory recital of *Miranda* warnings. In *Kingston* the arresting officer recited the *Miranda* warnings to the accused at the time of arrest without any apparent explanation as to its limitations. Later at the hospital the accused was requested to submit to a blood test, to which he replied he wanted to see his attorney. At his trial it was conceded by the arresting officer that he informed the accused he had the right to talk to a lawyer and have him present with him while he was being questioned. Furthermore, on cross-examination the officer admitted the only response received from the appellant at the hospital was that he wanted to see his attorney. Additional testimony showed the officer interpreted this response as an outright refusal. The court, in holding the issue of refusal should not have been decided as a matter of law, stated:

[I]t is conceivable that appellant, . . . misinterpreted the *Miranda* warning. If so, he was entitled to further elaboration by the officer before his request to 'see his attorney' was treated as an outright refusal to take the test. . . . [A]ppellant was at least entitled to a hearing on the question as to whether he misinterpreted the *Miranda* warning, and the court erred when it denied his petition 'out of hand.'<sup>59</sup>

Since *Pickard's* exception to the rule that disallows counsel to those accused of driving under the influence involves a small minority of drivers, a means should be developed to protect the majority of drivers from unnecessary confusion. Furthermore, the problem caused by *Miranda* warnings is more complicated in Nebraska because the arresting officer has to ascertain whether there

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<sup>57</sup> *Id.* at ---, 76 Cal. Rptr. at 808.

<sup>58</sup> 271 A.C.A. 622, 76 Cal. Rptr. 614 (1969).

<sup>59</sup> *Id.* at ---, 76 Cal. Rptr. at 617.

exists an appropriate factual context before clarifying the applicability of these warnings. The California courts have established a general rule requiring an unequivocal and clear explanation of the *Miranda* warnings to one accused of driving under the influence to prevent potential confusion. However, in Nebraska under *Pickard* it will be difficult to repair the confusion that could arise from unexplained *Miranda* warnings.

## VI. CONCLUSION

The dictum put forth in *Pickard* may prove to be the spring board for further expansion of constitutional rights to those accused of driving while under the influence. However, the decision has cast doubt on the validity of earlier decisions which have given a rather restrictive interpretation to the rights possessed by one accused of driving under the influence. Additional decisions will be required to reconcile the inconsistency between the rationale and the policy enunciated in *Prucha*, *Ziemba*, *Amick* and similar cases.

The court's attempt to find a middle ground between the extremes represented by New York on the one hand and other jurisdictions with implied consent laws such as California on the other has introduced unwarranted confusion into the arrest process. The determination of whether a felony has been committed may be impossible in some cases, for example, where the accused has been convicted twice.

*Pickard* has reopened the confusion existing between the power and authority of the criminal versus civil proceedings. Logically, the court in *Pickard* should have applied the waiver principle developed in *Prucha* which was used to reject a contention based on the fifth amendment. Since it did not, it has committed itself to an inconsistent application of the waiver principle which depends on the particular constitutional right alleged.

*Pickard* cannot be reconciled with the holding in *United States v. Wade*, which states that taking a blood sample was not a critical stage. There appears to be basic disagreement between the California interpretation of *Wade* and the Nebraska interpretation.

The issue of reciting *Miranda* warnings without further explanation was not decided by *Pickard*. However, it is submitted that confusion under the *Pickard* rule will also prevent clear and unequivocal interpretations by the arresting officer as to the use of *Miranda* warnings.

It is recommended that the Nebraska Supreme Court reconsider the effects of this dictum on the policy underlying the implied consent law and reject the dictum as inconsistent. The *Pickard* approach could be replaced by the New York approach which permits all those accused of driving under the influence access to a lawyer. Conversely, the court can follow the leading cases in California, Iowa, South Dakota, Virginia and Maine<sup>60</sup> which have denied the right to counsel at this stage without exception.

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<sup>60</sup> *State v. Stevens*, 252 A.2d 58 (Me. 1969). The *Stevens* case involved an appeal from a criminal conviction for drunk driving. After Stevens was placed under arrest he was informed of his constitutional right to remain silent and to assistance of counsel. The accused requested counsel to be present. He was then permitted to telephone a lawyer, but his attempt to reach his lawyer was unsuccessful. Thereafter, Stevens agreed to submit to a blood test and the results of the test were later introduced into evidence at his trial. Stevens contended that both his constitutional right to counsel and the privilege against self-incrimination were violated. These contentions were dismissed by the court as having no merit, based upon the holding in *Schmerber*. In respect to the right to counsel issue the court held: "Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate." *Id.* at 60 (quoting *Schmerber*).